Ng Yee Hong v Malaysian Institute of Accountants

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)-2232–12 OF 2019
LAU BEE LAN, RAVINTHRAN AND MOHD SOFIAN JJCA
20 NOVEMBER 2020

Legal Profession — Conflict of interest — Application to bar legal firm from acting for litigant — Legal firm ('STSP') acted for Investigation Committee ('IC') of body representing accountants ('MIA') in prosecuting disciplinary charges against accused before Disciplinary Committee ('DC') — DC found accused guilty on first charge but refused to dismiss second similar charge ('decision') — Accused filed judicial review ('JR') proceedings to quash decision naming only DC and MIA as respondents — STSP appeared for MIA in JR proceedings — MIA's council members formed panels of IC, DC and the appellate body, DAB — Whether STSP acted in conflict of interest in representing MIA — Whether STSP at JR proceedings could not act impartially but could potentially defend its earlier advice to IC that second charge against accused should not be dropped — Whether STSP could also potentially influence MIA's council members who sat in DAB with regard to the charges faced by accused — Whether in interest of administration of justice Court had to bar STSP from acting for MIA to negate appearance of conflict of interest on STSP's part

The appellant, a professional accountant and member of the respondent ('MIA') was investigated by the latter's Investigation Committee ('IC') concerning two complaints over his auditing of the accounts of a corporation. Following the investigations, the IC preferred disciplinary charges against the appellant in respect of both complaints before the Disciplinary Committee ('DC'). After the DC made a decision on the charge in respect of the first complaint ('NYH-1') — and while he appealed against the same to the Disciplinary Appeal Board ('DAB') — the appellant applied to the DC to dismiss the charge in respect of the second complaint ('NYH-2') on the ground that it was the same as the first charge. The DC dismissed the application. The appellant filed a judicial review application to quash the DC's decision naming only the DC and the MIA as the respondents in the application. When the legal firm ('STSP') which acted for the IC both at the disciplinary hearing before the DC and also in the appeal before the DAB appeared for the MIA at the judicial review proceedings, the appellant applied for an order to bar STSP from acting for MIA on the ground that it was in a position of conflict of interest since, inter alia: (a) STSP could not be objective in the judicial review proceedings and would potentially defend its advice to the IC that the NYH-2 charge should not be withdrawn; and (b) since the members of the IC, DC and DAB were drawn from the ranks of the council members of the MIA, STSP could

pre-emptively engage with members of the DC and DAB on matters relating to the two disciplinary proceedings. The High Court dismissed the recusal application based solely on an affidavit affirmed by an executive director of the MIA stating that the IC, DC and DAB were autonomous and independent bodies and that the MIA's council did not interfere with matters falling within their jurisdictions. In the instant appeal against the High Court's decision, the respondent argued that the appeal had become academic as the High Court had already heard and dismissed the judicial review application. The appellant, on the other hand, maintained that the appeal had not become academic as the appeal against the dismissal of the judicial review application was pending before another panel of the Court of Appeal.

Held, unanimously allowing the appeal and setting aside the decision of the High Court:

(1) The instant appeal was not academic as the appeal against the judicial review decision was still pending and STSP was still representing the MIA. Therefore a live controversy still existed between the parties in relation to the recusal application. By pursuing the instant appeal, the appellant could not be said to be pursuing a purely advisory opinion (see paras 14 & 16).

(2) The issue at hand was whether, by representing the MIA, STSP had placed itself in a conflict of interest position or otherwise could lead a reasonable person to perceive that it was unfair for STSP to act for MIA. The issue of appearance of conflict of interest and unfairness as opposed to actual conflict of interest had to be addressed. The High Court erred in relying almost exclusively on the affidavit of Dato Hj Muhamad Redzuan bin Abdullah of MIA in concluding that there was no conflict of interest if STSP continued to represent MIA in the judicial review proceeding. The affidavit only ruled out actual conflict of interest (see paras 26–27).

(3) As the members of the IC, DC and DAB were drawn from the council of the MIA, STSP could potentially liaise with any of the members of the three disciplinary bodies. It had to be remembered that the charge in NYH-2 was not dismissed and could potentially come before the DAB. It could not be denied that there was an appearance of a conflict of interest at the very least. The main issue in the judicial review proceedings was the propriety of the DC's decision not to dismiss the NYH-2 charge. As the IC was the investigator/prosecutor, the objectivity of STSP in defending the charge at the judicial review hearing could be open to question as it represented the IC at the DC hearing. In other words, STSP could very well defend its own earlier advice to the IC at the judicial review proceedings (see paras 29–30).

(4) The High Court's view that any other law firm appointed to represent MIA would be similarly conflicted as STSP was not tenable. Any other

law firm appointed to represent MIA would not have appeared for the IC at the DC hearing and, therefore, would be able to represent MIA at the judicial review hearing objectively and impartially without being preoccupied with the question of whether it had given the correct advice to the IC in respect of the NYH-2 charge (see para 31).

(5) Although a party's right to counsel of choice was not a trifling matter, the court should not flinch from striking a fair balance between the competing considerations of the right to counsel of choice and the broader interests of the administration of justice. The continued representation of MIA by STSP in the judicial review proceeding would lead to the perception that STSP was in a position of conflict of interest. It could also at the same time demolish the ethical wall between the three disciplinary committees that had been carefully constructed by the Accountants Act 1967 and the rules made thereunder. This could become an issue since the NYH-2 charge was not dismissed and could potentially come before the DAB by way of appeal (see para 32).

(6) The High Court judge had found that although the IC was not named as a respondent in the judicial review proceedings, it, in fact, had full carriage of the proceedings and for that reason STSP would not be taking instructions from MIA. From the legal standpoint, since only the DC and the MIA were the respondents in the judicial review proceedings, the IC could not claim that it had full carriage of the proceedings on behalf of the MIA and that STSP was actually representing it. The question of the IC having carriage of the proceedings should not arise (see paras 28–29 & 31).

[Bahasa Malaysia summary

Perayu, seorang akauntan profesional dan ahli pihak responden ('MIA') telah disiasat oleh Jawatankuasa Siasatan ('IC') terhadap dua aduan berhubung akaun syarikat yang diaudit oleh beliau. Setelah siasatan dijalankan, IC lebih memilih pertuduhan tatatertib terhadap perayu berkenaan dengan kedua-dua aduan tersebbut di hadapan Jawatankuasa Tatatertib ('DC'). Setelah DC membuat keputusan mengenai pertuduhan berkenaan dengan aduan pertama ('NYH-1') — dan sementara beliau mengemukakan rayuan terhadap perkara tersebut kepada Lembaga Rayuan Tatatertib ('DAB') — perayu memohon kepada DC untuk memberhentikan pertuduhan berkenaan dengan aduan kedua ('NYH-2') dengan alasan bahawa ia sama dengan pertuduhan pertama. DC menolak permohonan tersebut. Perayu memfailkan permohonan semakan kehakiman untuk membatalkan keputusan DC dengan hanya menamakan DC dan MIA sebagai responden dalam permohonan tersebut. Apabila firma guaman ('STSP') yang bertindak mewakili IC kedua-duanya semasa pendengaran tatatertib di hadapan DC dan juga dalam rayuan di hadapan DAB mewakili MIA semasa prosiding semakan kehakiman, perayu memohon perintah untuk menghalang STSP dari bertindak mewakili MIA dengan alasan

bahawa ia berada dalam posisi konflik kepentingan kerana, antara lain: (a) STSP tidak dapat bersikap objektif dalam prosiding semakan kehakiman dan berpotensi mempertahankan nasihatnya kepada IC bahawa tuduhan NYH-2 tidak boleh ditarik balik; dan (b) oleh kerana anggota IC, DC dan DAB dipanggil berdasarkan barisan anggota majlis MIA, STSP boleh terlebih dahulu terlibat mewakili anggota DC dan DAB mengenai perkara yang berkaitan dengan kedua-dua prosiding tatatertib. Mahkamah Tinggi menolak permohonan penarikan diri hanya berdasarkan afidavit yang diikrarkan oleh pengarah eksekutif MIA yang menyatakan bahawa IC, DC dan DAB adalah badan-badan autonomi dan bebas dan bahawa majlis MIA tidak mengganggu perkara-perkara yang termasuk dalam bidang kuasa mereka. Dalam rayuan semasa terhadap keputusan Mahkamah Tinggi, responden berpendapat bahawa rayuan tersebut telah menjadi akademik kerana Mahkamah Tinggi telah mendengar dan menolak permohonan semakan kehakiman. Perayu, walau bagaimanapun, berpendapat bahawa rayuan tersebut belum menjadi akademik kerana rayuan terhadap penolakan permohonan semakan kehakiman tersebut ditangguhkan di hadapan panel lain Mahkamah Rayuan.

Diputuskan, sebulat suara membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi:

(1) Rayuan semasa tidak bersifat akademik kerana rayuan terhadap keputusan semakan kehakiman masih belum selesai dan STSP masih mewakili MIA. Oleh itu, kontroversi semasa masih wujud antara pihak-pihak terhadap permohonan penarikan diri. Dengan meneruskan rayuan semasa, perayu tidak boleh dikatakan meneruskan nasihat berpendapat semata-mata (lihat perenggan 14 & 16).

(2) Isu yang harus ditangani adalah sama ada, dengan mewakili MIA, STSP telah meletakkan dirinya dalam posisi konflik kepentingan atau sebaliknya akan menyebabkan orang yang munasabah akan merasakan bahawa ianya tidak adil bagi STSP untuk bertindak mewakili MIA. Isu kehadiran konflik kepentingan dan ketidakadilan yang bertentangan dengan konflik kepentingan yang sebenarnya harus ditangani. Mahkamah Tinggi telah terkhilaf dengan hanya bergantungan kepada afidavit Dato Hj Muhamad Redzuan bin Abdullah dari MIA dalam membuat kesimpulan bahawa tidak ada konflik kepentingan sekiranya STSP terus mewakili MIA dalam prosiding semakan kehakiman. Afidavit tersebut hanya menolak konflik kepentingan yang sebenarnya (lihat perenggan 26–27).

(3) Oleh kerana ahli IC, DC dan DAB dipilih dari majlis MIA, STSP berpotensi untuk berkomunikasi dengan salah satu anggota ketiga-tiga badan tatatertib tersebut. Ianya harus diingatkan bahawa pertuduhan dalam NYH-2 belum ditolak dan berpotensi dipanggil di hadapan DAB. Ianya tidak dapat dinafikan bahawa ianya adalah sekuranya-kurangnya

timbul konflik kepentingan. Isu utama dalam prosiding semakan kehakiman adalah kesesuaian keputusan DC untuk tidak menolak pertuduhan NYH-2. Oleh kerana IC adalah penyiasat/pendakwa, tujuan STSP dalam membela pertuduhan pada pendengaran semakan kehakiman terbuka untuk disoal kerana ia mewakili IC pada pendengaran DC. Dengan kata lain, STSP boleh dikatakan membela nasihatnya sendiri kepada IC semasa prosiding semakan kehakiman (lihat perenggan 29–30).

(4) Pandangan Mahkamah Tinggi bahawa mana-mana firma guaman lain yang dilantik untuk mewakili MIA juga akan mempunyai konflik sebagaimana STSP tidak dapat dipertahankan. Mana-mana firma guaman lain yang dilantik untuk mewakili MIA tidak akan hadir untuk IC pada pendengaran DC dan, oleh itu, akan dapat mewakili MIA pada perbicaraan semakan kehakiman secara objektif dan tidak berat sebelah tanpa diganggu dengan persoalan sama ada ia telah memberikan nasihat yang betul kepada IC berkenaan dengan pertuduhan NYH-2 (lihat perenggan 31).

(5) Meskipun hak pihak untuk peguam yang dipilih bukanlah masalah yang remeh, mahkamah tidak boleh berhenti dari memberikan keseimbangan yang adil antara pertimbangan hak untuk mendapatkan peguam yang dipilih dan kepentingan pentadbiran keadilan yang luas. Dengan mewakili MIA secara berterusan oleh STSP dalam prosiding semakan kehakiman akan menyebabkan persepsi bahawa STSP berada dalam kedudukan konflik kepentingan. Ia juga akan sekaligus meruntuhkan tembok etika antara tiga jawatankuasa tatatertib yang telah dibina dengan cermat oleh Akta Akauntan 1967 dan peraturan yang dibuat di bawahnya. Ini boleh menjadi isu kerana pertuduhan NYH-2 belum ditolak dan berpotensi dipanggil di hadapan DAB secara rayuan (lihat perenggan 32).

(6) Hakim Mahkamah Tinggi telah membuat dapatan bahawa walaupun IC tidak dinamakan sebagai responden dalam prosiding semakan kehakiman, ianya, sebenarnya, telah menjalankan prosiding penuh dan atas alasan tersebut STSP tidak mengambil arahan dari MIA. Dari sudut pandangan undang-undang, oleh kerana hanya DC dan MIA yang menjadi responden dalam prosiding semakan kehakiman, IC tidak dapat mendakwa bahawa pihaknya telah menjalankan prosiding penuh bagi pihak MIA dan bahawa STSP sebenarnya mewakili mereka. Persoalan IC tidak boleh menjalankan prosiding seharusnya tidak timbul (lihat perenggan 28–29 & 31).]

Cases referred to

Ahmad Saidi bin Md Isa v Timbalan Menteri Hal Ehwal & Ors [2006] 3 MLJ 208, CA (refd)

Ambank (M) Bhd v Razshah Enteprise Sdn Bhd [2010] 2 MLJ 585, FC (refd)
Bar Council Malaysia v Tun Dato' Seri Arifin bin Zakaria & Ors (Persatuan Peguam-Peguam Muslim Malaysia, intervener) and another appeal [2020] 4 MLJ 773; [2018] 10 CLJ 129, HC (refd)
Black v Taylor [1993] 3 NZLR 403, CA (refd)
Dato' Sri Mohd Najib bin Hj Abdul Razak v Public Prosecutor [2019] 5 MLJ 623,CA (refd)
Denis O'Brien, Applicant v The Tribunal of Inquiry into Payments to Messrs Charles Haughey and Michael Lowry, (sole member Mr Justice Michael Moriarty), Respondent [2016] IESC 36, SC (refd)
Geveran Trading Co Ltd v Skjevesland [2003] 1 All ER 1, CA (refd)
Grimwade v Meagher, Hegland, Morgan, Lidgett, Reid & Bellheath Pty Ltd [1995] 1 VR 446, SC (refd)
Kooky Garments Ltd v Charlton [1994] 1 NZLR 587, HC (refd)
Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd [2006] 4 MLJ 113, FC (refd)
Quah Poh Keat & Ors v Ranjit Singh a/l Taram [2009] 4 MLJ 293, HC (refd)
Rowstead Systems Sdn Bhd v Bumicrystal Technology (M) Sdn Bhd [2005] 3 MLJ 132, CA (refd)
Vijayalakshmi Devi Nadchatiram v Sarawathy Devi Nadchatiram [2000] 4 CLJ 870, FC (refd)

Legislation referred to

Accountants Act 1967 s 20(1)
Courts of Judicature Act 1964 s 3

Appeal from: Civil Appeal No P-02(IM)(NCC)–1935–09 of 2018 (Court of Appeal, Putrajaya)

Malik Imtiaz Sarwar (Chan Wei June and Wong Min Yen with him) (Malik Imtiaz Sarwar) for the appellant.
T Sudhar (Tania Edward with him) (Steven Thiru & Sudhar Partnership) for the respondent.

Ravinthran JCA:

INTRODUCTION

[1] This is an appeal against the decision of the High Court that dismissed the application of the appellant to recuse a law firm from representing the second respondent in the judicial review application filed by the appellant.

BACKGROUND FACTS

[2] The applicant is a professional accountant and a member of the Malaysian Institute of Accountants ('MIA') which is set up under the Accountants Act 1967 ('the AA'). He audited the accounts of a corporation which is known as 1MDB for the financial years 2013 and 2014. In respect of this audit, two complaints were lodged with the MIA. One complaint was lodged by Mr Andrew Anand Solomon a/l Devesahayam on 31 March 2015. The other complaint was lodged by YB Mr Tony Pua Kim Wee on 26 May 2015.

[3] The investigation committee ('IC') of the MIA investigated both complaints. At the conclusion of the investigations, the IC preferred disciplinary charges in respect of both complaints against the appellant before the Disciplinary Committee ('DC') of the MIA pursuant to s 20(1) of the Accountants Act 1967. The parties have referred to the disciplinary proceedings as NYH-1 (complaint dated 31 March 2015) and NYH-2 (complaint dated 26 May 2015). The two proceedings were registered around the same time but NYH-1 was concluded earlier. The DC made a finding against the appellant on 5 September 2019 in NYH-1. The appellant filed an appeal to the Disciplinary Appeal Board of the MIA ('DAB'). The appeal is still pending. Subsequently, the appellant applied for dismissal of the charge in NYH-2 before the DC on the ground that the charge under it is the same as the charge in NYH-1. But on 23 September 2019, the DC dismissed this application.

[4] The appellant was dissatisfied with the decision of the DC on 23 September 2019 not to dismiss NYH-2 on the ground of res judicata. He filed a judicial review application to quash the said decision. The first respondent is the DC and the second respondent is the MIA. Mr T Sudhar and Miss Tania Edwards of Messrs Steven Thiru & Sudhar Partnership (STSP) appeared for the MIA at the judicial review proceedings. Mr T Sudhar had also appeared for the IC at the disciplinary hearing before the DC, ie in NYH-1 and NYH-2. The appellant filed an application (encl 21) to recuse any lawyer from the firm of STSP from representing the MIA as either solicitor or counsel in the judicial review proceedings.

DECISION OF HIGH COURT

[5] The grounds of the application to recuse STSP as summarised by the learned High Court judge are as follows:

(i) STSP represents the IC in the pending appeal before the DAB in regard to the decision of the DC on the NYH-1 proceedings.

(ii) The judicial review application will involve an examination of the NYH-1 and NYH-2 proceedings.

(iii) By representing MIA in the appeal before the DAB and in the judicial review proceedings, STSP would be engaged pre-emptively with members of the DC and the DAB on matter relating to the NYH-1 and NYH-2 proceedings.

(iv) As MIA and its funds are managed by the MIA Council, STSP would purportedly be taking instructions from the Council, which comprises of members of the IC, DC, and the DAB in relation to the NYH-1 and NYH-2 proceedings.

[6] Based on the decision of this court in *Quah Poh Keat & Ors v Ranjit Singh a/l Taram* [2009] 4 MLJ 293, the learned High Court judge directed himself that the appellant must establish a strong case based on affidavit evidence. His Lordship referred to the basic argument of the appellant, ie that by representing the IC before the DC and at the same time representing the MIA in the judicial review proceedings and DAB, STSP would be 'engaged pre-emptively with members of the DC and DAB on matters relating to NYH-1 and NYH-2'. He found that the affidavit of the Executive Director of the Surveillance and Enforcement Division of MIA, Dato' Hj Muhamad Redzuan bin Abdullah contradicted this contention. Dato' Hj Muhamad Redzuan bin Abdullah who affirmed the affidavit on behalf of MIA stated that the IC, DC and DAB are autonomous and independent committees and that the council of the MIA is not involved in matters falling within their respective purviews. He thus found that STSP was not in a position of conflict of interest by representing the MIA in the judicial review proceedings. The recusal application was dismissed by the High Court on 28 November 2019. The instant appeal is from this decision of the High Court.

PRELIMINARY OBJECTION TO APPEAL

[7] At the outset of the appeal, Mr T Sudhar for the second respondent raised the following preliminary objection. It is as follows. After the High Court dismissed the recusal application (encl 21), the appellant filed the instant appeal against the decision on 2 December 2019. However, the appellant did not apply to stay the judicial review proceedings pending the outcome of the appeal. The judicial review proceedings continued and concluded in favour of the respondents on 26 February 2020.

[8] The argument of Mr T Sudhar is that the instant appeal is academic because the High Court has already heard and dismissed the judicial review. The main prayer in encl 21 was to recuse STSP from appearing as solicitors or counsel in 'the proceedings herein'. And since, the appellant did not apply for stay of proceedings but was content to reserve his rights in respect of his appeal

against the decision of the High Court, Mr T Sudhar argued that upon conclusion of the said proceedings, the appeal has become academic.

[9] On the other hand, counsel for the appellant (Dato' Malik Imtiaz Sarwar) argued that the matter has not become academic. He pointed out that upon dismissal of encl 21, he intimated to the court and Mr T Sudhar that his client would be filing an appeal against the decision. He also indicated that he would not apply for stay of proceedings to enable the matter to proceed expeditiously. His law firm wrote a letter to the solicitors of the respondents to state that his client reserved all his rights in respect of the appeal. Counsel for the appellant also submitted that as the appeal against encl 21 is still pending before this court, a matter in actual controversy exists between the parties and therefore, the instant appeal is plainly not academic.

DECISION ON PRELIMINARY OBJECTION

[10] Mr T Sudhar argued that our courts do not act in vain and waste time in answering academic questions which have no effect on the position between the parties. In support, he cited the cases of *Bar Council Malaysia v Tun Dato' Seri Arifin bin Zakaria & Ors (Persatuan Peguam-Peguam Muslim Malaysia, intervener) and another appeal* [2020] 4 MLJ 773; [2018] 10 CLJ 129, *Ambank (M) Bhd v Razshah Enteprise Sdn Bhd* [2010] 2 MLJ 585 and *Ahmad Saidi bin Md Isa v Timbalan Menteri Hal Ehwal & Ors* [2006] 3 MLJ 208. In respect of the test to be applied to determine whether an appeal has become academic, Mr T Sudhar cited the following passage from the oft-quoted Federal Court case of *Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113:

> The test, therefore, in deciding whether an appeal has become academic is to determine whether there is in existence a matter in actual controversy between the parties which will affect them in some way. If the answer to the question is in the affirmative the appeal cannot be said to have become academic.

[11] Counsel for the appellant did not disagree with the principles laid down in the above-mentioned cases. However, he disputed the argument that the matter is academic as the appeal from the decision in the judicial review is still pending before another panel of this court.

AMBIT OF 'PROCEEDINGS HEREIN'

[12] Mr T Sudhar referred to the prayer in encl 21 that refers to 'proceedings herein'. His argument is that these are limiting words that confined the recusal application to the judicial review proceedings in the High Court only. Counsel for the appellant submitted that the term 'proceedings' should be read broadly to include appeals. He cited *Black's Law Dictionary* (11th Ed, Thomson

Reuters, quoted in Edwin E Bryant, *The Law of Pleading Under the Codes of Civil Procedure*) which defines 'proceeding' to include 'the taking of appeal'. He also cited s 3 of the Courts of Judicature Act 1964 that defines 'proceeding' as follows'

> 'proceeding' means any proceeding whatsoever of a civil or criminal nature and includes an application at any stage of a proceeding;

[13] We are of the view that notwithstanding the reference 'herein' in 'proceedings herein' in prayer (2) of encl 21, 'proceeding' must be read broadly to include any application in relation to the judicial review matter and any appeal arising from it. Otherwise, even if the appellant had been successful in the recusal application before the High Court, he would be required to make further recusal applications on the same grounds at the Court of Appeal and the Federal Court.

WHETHER RELIEF WOULD BE NUGATORY?

[14] In arguing that the appeal has become nugatory, Mr T Sudhar referred us to the Irish Supreme Court case of *Denis O'Brien, Applicant v The Tribunal of Inquiry into Payments to Messrs Charles Haughey and Michael Lowry, (sole member Mr Justice Michael Moriarty), Respondent* [2016] IESC 36. In that case, the appeal in question was in respect of a ruling pertaining to cross-examination of a witness in an inquiry. The Irish Supreme Court applied the doctrine of mootness and held that a live controversy had to be present. We agree with counsel for the appellant that the facts of the said case are materially different from the instant case. In the above-mentioned case, the subject matter of the appeal pertained to rulings made in relation to cross-examination of a witness. Since the inquiry had been completed, it goes without saying, any appeal on the issues in respect of cross-examination of a particular witness would be moot. Furthermore, the Irish Supreme Court noted that the report in respect of the inquiry had been published and there was no judicial review application to challenge it. Therefore, any relief granted would be nugatory. In the instant case, the appeal against the judicial review decision is still pending and STSP is still representing the second respondent. Therefore, by pursuing the appeal in the instant case, the appellant cannot be said to be pursuing a purely advisory opinion.

OTHER ISSUES

[15] We are mindful that parties had canvassed also other issues and had devoted lengthy submissions to them. Mr T Sudhar submitted that the purpose of the appeal is to overturn the decision of the High Court in the judicial review case. We find that the motive of the appellant in pursuing the appeal is not a relevant consideration. It is not the function of this court to delve into the mind

of the appellant and speculate on the strategies he may adopt to succeed in the appeal against the judicial review decision. The effect of our decision herein on the judicial review decision of the High Court must be dealt with by the Court of Appeal panel that hears the judicial review appeal. Mr T Sudhar submitted that the appellant should have applied to stay the proceedings in the High Court upon failing to recuse STSP. Otherwise, the High Court proceedings would be wasted. In support, he cited the case of *Rowstead Systems Sdn Bhd v Bumicrystal Technology (M) Sdn Bhd* [2005] 3 MLJ 132. In that case, the application to recuse the learned judicial commissioner by the defendant failed. The defendant then applied for a stay of proceedings at the Court of Appeal. In allowing the stay of proceedings, the Court of Appeal observed as follows:

> [15] We have also taken into consideration the fact that in the event that a stay a proceedings was not granted and the learned JC be allowed to proceed with the hearing of this case, it would result in a waste of time and effort by all persons involved since if the Court of Appeal allows the appeal the whole proceedings conducted by the learned JC would have to be completely expunged. In the circumstances it would be more expedient to allow a stay of the proceedings until the hearing of the appeal has been completed.

[16] In the instant case, as we said earlier, no application to stay the proceedings was made. Nonetheless, no authority was cited by Mr T Sudhar that states that the entire proceeding in the lower court would be expunged if opposing counsel is later disqualified at the appellate level. The above-mentioned case was in respect of disqualification of the presiding judge as opposed to disqualification of counsel. As we have said earlier, this is a matter that must be addressed in the judicial review appeal hearing. Mr T Sudhar was also unable to cite any authority that states that failure to apply for stay of proceedings upon losing an application to recuse opposing counsel would disentitle the appellant from proceeding with the appeal against the said recusal decision. In any event, regardless of whether the legal consequence is that the judicial review proceeding is expunged if the appellant is successful in the instant appeal, the appeal against the judicial review decision has not been decided as yet. Therefore, the more pertinent issue in regard to the preliminary objection is this, ie whether there exists a live issue between the parties in relation to the recusal application. It is plain to us that the instant appeal is not academic as the appeal against the judicial review decision is still pending. Furthermore, STSP is still representing the second respondent. For this reason, we find that a live controversy still exists between the parties in relation to the recusal application. Therefore, we do not propose to address all the other issues canvassed by the parties. We shall unanimously dismiss the preliminary objection and proceed to hear the appeal on the merits.

A RECUSAL APPLICATION

[17] We shall first refer to the existence of the inherent power of the court to control the right of audience and bar lawyers who appear to be in a conflict of interest position for the greater good of the administration of justice. In *Vijayalakshmi Devi Nadchatiram v Sarawathy Devi Nadchatiram* [2000] 4 CLJ 870, the Federal Court recognised this inherent power. The Federal Court cited with approval the New Zealand Court of Appeal decision of *Black v Taylor* [1993] 3 NZLR 403 which held that the court has inherent power to prevent a barrister from acting as counsel in a matter in which he had a conflict of interest, or in which he appeared to have a conflict of interest such that justice would not be seen to be done. Richardson J in explaining the inherent jurisdiction of the court to bar counsel who find themselves in a conflict of interest position said as follows:

> I respectfully agree with the approach of the Ontario Court. Disqualification will ordinarily be the appropriate remedy where the integrity of the judicial process would be impaired by counsel's adversarial representation of one party against the other. The decision to disqualify is not dependent on any finding of culpable conduct on the lawyer's part. Disqualification is not imposed as a punishment for misconduct. Rather it is a protection for the parties and for the wider interests of justice. The legitimacy of judicial decisions depends in large part on the observance of the standards of procedural justice. Where the integrity of the judicial process is perceived to be at risk from the proposed or continuing representation by counsel on behalf of one party, disqualification is the obvious and in some cases the only effective remedy although considerations of delay, inconvenience and expense arising from a change in representation may be important in determining in particular cases whether the interests of justice truly demand disqualification.

[18] The other authority cited by counsel for the appellant is the case of *Grimwade v Meagher, Hegland, Morgan, Lidgett, Reid & Bellheath Pty Ltd* [1995] 1 VR 446 which is a decision of the Supreme Court of Victoria (cited recently by this court in the case of *Dato' Sri Mohd Najib bin Hj Abdul Razak v Public Prosecutor* [2019] 5 MLJ 623). The view expressed in *Black v Taylor* was echoed by the Supreme Court of Victoria in the *Grimwade* case. The relevant passage reads as follows:

> It is within the inherent jurisdiction of a superior court to deny the right of audience to counsel when the interests of justice so require by reason of conflict or otherwise. This power does not depend on the rules of professional conduct made by the legal profession and is not limited to cases where the rules are breached. The issue here is not whether or not the rule was breached, or whether the solicitor worked for the government. Nor is it solely whether the patient lost confidence in the process. The issue is whether the fair minded reasonably informed member of the public would conclude that the proper administration of justice required the removal of the solicitor ... The public interest in the administration of justice requires an unqualified perception of its fairness in the eyes of the general public ...

> The goal is not just to protect the interests of the individual litigant but even more importantly to protect public confidence in the administration of justice ...

[19] Therefore, the right to counsel of choice is not absolute and has to give way in appropriate cases to the overriding principles of fairness and justice.

[20] We shall now recapitulate the essential facts that underlie the recusal application. Mr T Sudhar represented the IC at the disciplinary hearing before the DC in NYH-1. Upon conclusion of NYH-1, the appellant sought to dismiss the charge in NYH-2 on ground of res judicata. The DC refused to dismiss the charge. The appellant then launched judicial review proceedings to seek relief.

[21] Before proceeding further, in order to fully appreciate the complaint of the appellant, we shall set out briefly the disciplinary mechanism under the AA. The AA set up the MIA to regulate the practice of accountancy in Malaysia. The council that runs the MIA consists of 25 to 30 members (see s 8). For the purpose of regulating disciplinary matters, the Act provides for the setting up of three independent committees (the IC, DC and DAB) that consists of five council members each. The MIA is also empowered by the AA to make rules to regulate disciplinary proceedings. The IC investigates complaints against members and refers to the DC for action if there are sufficient grounds. The DAB hears appeal from the decision of the DC. The IC is entitled to appoint an advocate and solicitor to appear on its behalf at the hearing before the DC. The DC can also appoint an advocate and solicitor to advise it at the disciplinary proceedings. Thus, the Act and the rules made by the MIA have provided for disciplinary matters to be dealt with by three independent committees that function as investigator/prosecutor, first instance court and appellate court. However, it is crucial to note that all the members of the said committees are drawn from the ranks of the council of the MIA.

[22] The appellant sued the DC and the MIA which is the body corporate under the AA in the judicial review proceeding. The decision that is the subject of challenge in the judicial review proceeding is the decision of the DC. The IC is not a party. Mr T Sudhar of STSP who represented the IC at the disciplinary hearing before the DC, is now representing the MIA in the judicial review proceeding. The DC is represented by another law firm.

[23] Counsel for the appellant argued that, firstly, the clear boundaries between the various disciplinary committees would be erased if any lawyer from STSP is allowed to represent the MIA. This is because the members of the IC, DC and DAB come from the ranks of the council of the MIA. Therefore, STSP can pre-emptively engage with the members of the council in taking instructions as they are representing the MIA. The second argument is that

A STSP cannot be objective in the judicial review proceeding as they would have an interest in defending their own advice to the IC in maintaining the prosecution of the charge in NYH-2.

B **[24]** The argument of Mr T Sudhar on the first issue is as follows. STSP is only taking instructions from the IC in the judicial review proceeding. The MIA does not have 'carriage of the proceedings' but that the IC does. In the premises, the question of the lawyers of STSP interacting with the council members of the MIA does not arise. The MIA relied heavily on the affidavit of its Executive Director of the Surveillance and Enforcement Division, Dato' Hj C Muhamad Redzuan bin Abdullah that we referred to earlier. He deposed in the said affidavit that all the said disciplinary committees are autonomous and that the council of MIA is not involved in matters that comes within their respective purviews.

D

[25] As we have said earlier, the decision of the learned High Court Judge to dismiss encl 21 is based entirely on the above-mentioned affidavit. He found that Dato' Hj Muhamad Redzuan bin Abdullah was well versed with the scheme of the AA. His Lordship accepted the averment in the affidavit that E only the IC has carriage of the proceedings in the judicial review matter and that the contention of the appellant that STSP would engage with the MIA in taking instructions is speculative. He also warned himself that the court should be slow to interfere with a litigant's choice of counsel.

F DECISION

[26] In our opinion, the learned High Court judge erred in relying almost exclusively on the affidavit of Dato' Hj Muhamad Redzuan bin Abdullah in making several findings that led him to conclude that there was no conflict of G interest if STSP continued to represent MIA in the judicial review proceeding. We also find that the learned High Court judge did not address the question of appearance of conflict of interest and unfairness as opposed to actual conflict of interest and unfairness.

H **[27]** As we emphasised earlier, the learned High Court judge accepted the averments in the said affidavit as Dato' Hj Muhamad Redzuan bin Abdullah is well versed with the disciplinary scheme under the AA. To our mind, the factual averments to the effect that there would not be interference in the workings of the said the IC, the DC and the DAB cannot conclude the issue at I hand. In fact, the scheme of the AA provides for the independence of the IC, DC and DAB and it can be presumed that by the requirement of the law, there should be no interference in their workings. However, the issue at hand is whether STSP by representing the MIA, had placed itself in a conflict of interest position or otherwise would lead a reasonable person to perceive that it

is unfair for the law firm to act for the MIA. Thus, the issue of appearance of conflict of interest and unfairness as opposed to actual conflict of interest must be addressed. The said affidavit only rules out actual conflict of interest. In *Geveran Trading Co Ltd v Skjevesland* [2003] 1 All ER 1 which was cited by counsel for the appellant, the English Court of Appeal said as follows:

> Furthermore, it was not necessary for the party objecting to an advocate to show that unfairness would actually result, and in many cases it would be sufficient that *there was a reasonable lay apprehension that that was the case*. (Emphasis added.)

[28] We are mindful that based on the said affidavit, the learned High Court Judge found that the IC has full carriage of the judicial review proceedings and that for this reason, STSP would not be taking instructions from the MIA. However, only the DC and the MIA are named as respondents in the cause papers. The IC could have intervened in the judicial review proceedings but failed to do so. In the premises, regardless of whatever arrangement is made behind the scenes in respect of 'carriage of the proceedings', from the standpoint of the rules of court, STSP is the advocate and solicitor for the MIA. In fact, by arguing that the IC has 'carriage of the proceedings', Mr T Sudhar has given the impression that the retainer granted to his law firm by the MIA is being used as a vehicle to make the IC a shadow respondent in order to circumvent the rules of court that requires the IC to be added as an intervener to achieve the same result.

[29] As the IC did not intervene, they have no right to claim that they have full carriage of the proceedings on behalf of the MIA and that STSP is actually representing them. In fact, the said argument also runs counter to the disciplinary scheme set up under the AA and the rules made thereunder that we have discussed earlier. The elaborate statutory provisions speak to the independence and autonomy of the separate disciplinary committees. As the members of the three committees are drawn from the council of the MIA, STSP could potentially liaise with any of the members of the IC, DC or DAB. It must not be forgotten that the charge in NYH-2 was not dismissed and therefore can potentially come before the DAB. We hasten to add that we are not suggesting for one moment that Mr TSudhar or STSP will act unprofessionally by discussing any appeal before the DAB with any of the members of the council of the MIA. However, it cannot be denied that there is an appearance of a conflict of interest at the very least. The primary issue in the judicial review proceedings is the propriety of the decision of the DC not to dismiss the charge in NYH-2. As the IC is the investigator/prosecutor, we agree with counsel for the appellant that the objectivity of STSP in defending the charge at the judicial review hearing would be open to question as they represented the IC at the DC hearing. In other words, STSP could very well be defending their own earlier advice to the IC at the judicial review proceedings. As lawyers are officers of the court, apart from advancing the cause of their

client, they have an overriding duty to the cause of justice. This is the reason that the court can rightfully expect a measure of independence and objectivity from them in the conduct their duty (see *Kooky Garments Ltd v Charlton* [1994] 1 NZLR 587 that was cited by counsel for the appellant).

[30] The argument that STSP is in a better position to represent the MIA as it is acquainted with the facts and evidence relating to the disciplinary proceedings is also not tenable as we note that the DC appointed a different law firm to represent it in the judicial review proceeding. It must be borne in mind that the impugned decision which is the subject of the judicial review proceeding is that of the DC and not the IC. The relevant disciplinary proceeding documents could have been made available easily to any law firm instructed to represent the MIA. Thus, given the apparent conflict of interest, we cannot see why the MIA must appoint STSP who represented the IC at the prosecution stage before the DC.

[31] We also disagree with the opinion of the learned High Court judge that any other law firm that is appointed to represent the MIA would be similarly conflicted as STSP. Any other law firm appointed to represent the MIA would not have appeared for the IC at the DC hearing. Thus, they would be able to represent the MIA at the judicial review hearing objectively and impartially without being preoccupied with the question whether they had given the correct advice to the IC in respect of the charge in NYH-2. We would again emphasize that from the legal standpoint, there are only two respondents in the judicial review proceeding, ie the DC and the MIA. Therefore, the question of the IC having carriage of the proceedings should not arise.

[32] Finally, we must perforce state that we are mindful of the cautionary advice of Arden LJ in *Geveran Trading Co Ltd v Skjevesland* that a judge should not too readily accede to an application to remove opposing counsel lest it is used for tactical reasons to cause inconvenience and delay. The right to counsel of choice is not a trifling matter. However, the court should not flinch from striking a fair balance between the competing considerations of the right to counsel of choice and the broader interests of the administration of justice. In the instant case, for the reasons given above, we are of the view that the continued representation of the MIA by STSP in the judicial review proceeding would lead to the perception that STSP had placed itself in a position of conflict of interest. It could also at the same time demolish the ethical wall between the three disciplinary committees that had been carefully constructed by the AA and the rules made thereunder. This could become an issue as we noted earlier that the charge in NYH-2 was not dismissed and could potentially come before the DAB by way of appeal.

[33] For all the above reasons, we shall unanimously allow the appeal, grant

order in terms of prayer (1) and (2) of encl 21 and set aside the decision of the High Court dated 28 November 2019 with costs of RM15,000 here and below which shall be subject to payment of allocatur.

POSTSCRIPT

[34] After this judgment was prepared and two days before the decision was delivered, STSP wrote to the court saying that the DAB dismissed the appeal of the appellant on 9 November 2020 in NYH-1. However, we decided not to invite further arguments from the parties in the light of this development as it does not have any significant impact on our decision.

Appeal allowed.

Reported by Ashok Kumar